



Public Notice

**US Army Corps
of Engineers**
Louisville District
Huntington District
Nashville District

Public Notice No.

200300027

Date:

January 31, 2003

Closing Date:

February 21, 2003

Please address all comments and inquiries to:

U.S. Army Corps of Engineers, Louisville District

ATTN: Mr. James M. Townsend, Chief, Regulatory Branch

P.O. Box 59

Louisville, Kentucky 40201-0059

Phone: (502) 315-6687

Permits are required through the Rivers and Harbors Act for work in or affecting navigable "waters of the United States (U.S.)" and through the Clean Water Act (CWA) for the discharge of dredged and/or fill materials within "waters of the U.S." The U.S. Army Corps of Engineers (COE) and the Kentucky Natural Resources and Environmental Protection Cabinet's Division of Water (KDOW) administer the above permitting process. These regulatory agencies, in coordination with the Federal and State resource agencies, require that impacts to streams and wetlands be avoided and minimized. Compensatory mitigation may be required when unavoidable impacts will result in the loss of aquatic resource functions and values.

Compensatory mitigation projects are designed to replace aquatic resource functions and values that are adversely impacted by issuance of Department of the Army (DA) permits pursuant to Section 404 of the CWA and Section 10 of the Rivers and Harbors Act. These mitigation objectives are stated in regulation; the 1990 Memorandum of Agreement on mitigation between the US Environmental Protection Agency (USEPA) and the DA; the November 28, 1995, Federal Guidance on the Establishment, Use and Operation of Mitigation Banks ("Banking Guidance"); and the November 27, 2000, "Federal Guidance on the Use of In-Lieu-Fee Arrangements for Compensatory Mitigation Under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act" ("In-Lieu-Fee Guidance").

In-Lieu-Fee mitigation occurs in circumstances where a permittee provides funds to an In-Lieu-Fee recipient in lieu of completing project specific mitigation or purchasing credits from an approved mitigation bank. A fundamental precept of the CWA Section 404(b)(1) Guidelines is that no discharge of fill material into "Waters of the U.S." be permitted unless appropriate and practicable steps have been taken to minimize all adverse impacts associated with said discharge. The Section 404(b)(1) Guidelines establish a mitigation sequence, under which compensatory mitigation is required to offset losses to "Waters of the U.S." The Section 404 permit program relies on the use of compensatory mitigation to offset unavoidable impacts by replacing lost functions and values.

The development of an In-Lieu-Fee Program is a means by which a permittee may fulfill the mitigation requirement for both wetland and stream impacts through the payment of funds directly to groups who

utilize these funds to protect, restore, and enhance impacted and/or impaired "Waters of the US."

On January 12, 2000, the Louisville and Nashville Districts issued a public notice (#199900760) announcing an "In-Lieu-Fee Stream Mitigation Program" for impacts to streams located in Kentucky. The notice solicited participation from State, Local, and non-profit organizations that had the capability to restore stream corridors, as well as asked these organizations and the general public to identify stream corridor restoration opportunities.

To date, three Memoranda of Agreement have been executed by the Corps designating the Kentucky Department of Fish and Wildlife, the Louisville and Jefferson County Metropolitan Sewer District, and jointly with the Environmental Resource Management Center of Northern Kentucky University and the Northern Kentucky University Foundation as In-Lieu-Fee recipients for Department of the Army Permits. These agreements include provisions whereby the Corps establishes a Mitigation Review Team (MRT).

The MRT includes representatives from the Corps, the U.S. Fish & Wildlife Service, the USEPA, the KDOW, and the Kentucky Division of Fish and Wildlife. The MRT will function to define the conditions under which the in-lieu-fees may be used; approve proposed projects for design and construction with in-lieu-fee monies; and perform annual reviews of ongoing and completed projects. Since the Corps will function as the Chair of the MRT, we are hereby seeking public comment on the enclosed Draft **Local Procedures on the Functions of the Mitigation Review Team and Use of In-Lieu-Fee Mitigation in Kentucky** (Local Procedures).

This notice announces the availability of the Draft Local Procedures for public comment, on behalf of the Louisville, Huntington and Nashville Districts, regarding the functions, responsibilities, and procedures of the Mitigation Review Team to be established in support of the "In-Lieu-Fee Stream Mitigation Program" for the Commonwealth of Kentucky.

The Corps is soliciting comments from the public; Federal, State, and local agencies and officials; Indian tribes; and other interested parties in order to consider and evaluate these Draft Local Procedures for use by the Louisville, Huntington, and Nashville Districts in Kentucky. After consideration of the public comments, the MRT will issue the Local Procedures as final.

Information pertaining to this notice is available for public examination during normal business hours and upon prior request for the duration of the 21-day comment period. The opening and closing dates of this Public Notice are listed at the top of page one. All comments regarding this

Operations Division
Regulatory Branch
ID No. 200300027

proposal should be addressed to Mr. James M. Townsend, Chief,
Regulatory Branch, at the address noted above and should refer to
the Public Notice Number 200300027.

**LOCAL PROCEDURES ON THE FUNCTIONS OF THE MITIGATION REVIEW TEAM
AND USE OF IN LIEU FEE MITIGATION IN KENTUCKY**

I. INTRODUCTION:

A. Permits are required through the Rivers and Harbors Act for work in or affecting navigable "waters of the United States (U.S.)" and through the Clean Water Act (CWA) for the discharge of dredged and/or fill materials within "waters of the U.S." The U.S. Army Corps of Engineers (COE) and the Kentucky Natural Resources and Environmental Protection Cabinet's Division of Water (KDOW) administer the above permitting process. These regulatory agencies, in coordination with the Federal and State resource agencies, require that impacts to streams and wetlands be avoided and minimized. Compensatory mitigation may be required when unavoidable impacts will result in the loss of aquatic resource functions and values.

B. Compensatory mitigation projects are designed to replace aquatic resource functions and values that are adversely impacted by issuance of Department of the Army (DA) permits pursuant to Section 404 of the CWA and Section 10 of the Rivers and Harbors Act. These mitigation objectives are stated in regulation; the 1990 Memorandum of Agreement on mitigation between Environmental Protection Agency (EPA) and the DA; the November 28, 1995, Federal Guidance on the Establishment, Use and Operation of Mitigation Banks ("Banking Guidance"); the November 7, 2000, Federal Guidance on the Use of In-Lieu-Fee Arrangements for Compensatory Mitigation Under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act ("In-Lieu-Fee Guidance"); and the December 24, 2002, Regulatory Guidance Letter 02-02 on compensatory mitigation projects.

C. Compensatory mitigation generally requires the permittee to mitigate on-site or to locate an impaired stream or wetland off-site, then restore it to a suitable functional condition. Locating good mitigation sites can be problematic for permittees in certain situations. Another option that can be considered is the payment of in-lieu-fees to an entity that will expend the monies to implement stream and wetland restoration projects. The Corps may execute written agreements with these entities for the purposes of in lieu fee mitigation. The following procedures have been developed in consideration of the "In-Lieu-Fee Guidance."

II. MITIGATION REVIEW TEAM (MRT) :

A. The COE in cooperation with other Federal and State resource agencies will establish and chair a MRT which will function to define the conditions under which the in-lieu-fees may be used, to approve proposed projects for design and construction with in-lieu-fee monies,

and to perform a yearly review of ongoing and completed projects. The MRT will include a single representative from each COE district, KDOW, U.S. Fish and Wildlife Service (FWS), EPA, and the Kentucky Department of Fish and Wildlife Resources (KDFWR). The State of Kentucky includes more than one COE District; therefore, the district within which the project is located would approve the restoration project. The in-lieu-fee recipient (recipient) will maintain a schedule of in-lieu-fee funds received and expended within each COE district geographic boundary.

B. The MRT will be directly involved in approval of enhancement/restoration projects by a simple majority vote. These votes will occur at scheduled quarterly meetings of the MRT. Additional meetings may be held on an "as needed" basis and will be agreed upon by a majority of the MRT. At these meetings, the recipient will present to the MRT for approval the preliminary plans/scopes of work on candidate restoration sites and final design plans so that project design may commence. In order to be considered by the MRT, a preliminary plan will be submitted 30 days in advance of each quarterly meeting. In order for the MRT to approve construction, design plans will be submitted 60 days in advance of the scheduled quarterly meeting. If the construction project necessitates a discharge of dredged and/or fill material into "waters of the U.S.," then an application for a DA permit will accompany the design plans.

C. When travel is a problem, voting by MRT members may be accomplished via E-mail, FAX, or letter within 3 days of the meeting. The COE, KDOW, KDFWR (Environmental Section), FWS, and EPA will appoint an individual within their agency to participate as a member of the MRT, and pay any travel and labor expenses. No voting team member can charge labor or travel to an in-lieu-fee fund.

III. PROJECT TYPE:

A. Funded projects must directly relate to compensation for impacts to the aquatic environment that are similar to impacts resulting from the administration of the COE Regulatory Program. When COE permits are issued conditioned on the payment of money in lieu of other mitigation, that money must be used to fulfill the requirements of mitigation to offset the loss to the aquatic environment that the CE is responsible for under federal law to protect. These impacts typically result in the physical loss of aquatic habitat and related aquatic functions of streams, wetlands, or other special aquatic sites as defined in 40 CFR 230(q-1). Although there may generally not be a one-to-one relationship between impact sites and mitigation projects, on an overall basis, the projects should balance the loss of aquatic functions to meet the Federal goal of no net loss.

For example, impacts resulting from permitted coal mining activities in the Eastern Kentucky Coalfield Region should be mitigated by in-kind restoration of functions and values considering opportunities first in the same watershed, river basin, and eco-region. Types of projects generally acceptable for funding are as follows:

1. Full-scale restoration of a stream to its natural pattern, profile and dimension along with creating aquatic habitat and establishing riparian vegetation and floodplain function.
2. Removing culverts (daylighting) or concrete lining from stream channels, then restoring the characteristic pattern, profile, dimension, and riparian zone to the affected stream segment.
3. Stream enhancement, which includes establishing riparian vegetation, the stabilization of eroding stream banks through bioengineering techniques or other habitat-friendly means and the creation of aquatic habitat in-stream. Bank stabilization measures such as gabions, excessive riprap, retaining walls or grouting will not be considered suitable for in-lieu-fee funding in most situations.
4. Permanent protection of stream riparian corridors through Conservation Easements or acquisition of ecologically sensitive stream corridors.

B. Projects that will not be approved for the expenditure of in-lieu-fee money include:

1. Projects or planning documents that have a primary purpose of water supply, flood control, sewer improvements, or other water-related improvements that do not involve aquatic habitat restoration work.
2. Any project that seeks or receives matching Federal funds or grants. The purpose of in-lieu-fee is to provide compensatory mitigation of impacts resulting from the COE Regulatory Program. It is not appropriate to expend Federal funds or grants to mitigate these impacts because the Federal government would essentially be funding mitigation projects for impacts resulting from private actions.
3. Projects such as nature trails adjacent to streams, boat ramps, creating fishing access, and similar access projects do not qualify.

IV. CRITERIA FOR PROJECT SELECTION:

A. Recipients will work with KDFWR Private and Public Lands Biologists, Federal, State, and local agencies, landowners, and other entities to locate potential sites for mitigation. Typically, this would include degraded wetlands, straightened or channelized streams, unstable stream channels, stream segments lacking riparian vegetation and similar impairments. However, not all degraded or impaired streams or wetlands

will qualify as potential mitigation projects to be funded with in-lieu-fee monies. A variety of factors will be evaluated to determine if a site is a suitable candidate. These factors include:

1. The degree of impairment, need, and functional replacement. Extremely degraded streams (void of aquatic life or nearly so) that have been straightened, channelized, lined with concrete or culverted will usually offer good opportunities for improvements to natural functions and values, and will generally be considered as good candidates for in-lieu-fee mitigation projects. Likewise, streams with severe bank erosion, stream segments lacking riparian vegetation, and similar problems will be considered good candidates. Previously impacted stream reaches that have recovered, with respect to habitat, water quality and channel stability, will generally not be considered suitable project sites.

2. Landowner Cooperation. In order for a potential project site to be acceptable, the perspective landowner must be receptive to having stream enhancement or restoration work performed on his/her land and must be willing to allow permanent protection (e.g., through a Deed Restriction, Conservation Easement or similar written agreement) of the subject stream corridor.

3. Technical Feasibility and Likelihood of Success. The in-lieu-fee mitigation project should focus on natural ecological processes and should be planned and designed to be self-sustaining over time to the extent possible. The work must result in some tangible increase in ecological function and benefit to the stream. Stream reaches where insurmountable problems exist, and enhancement/restoration would not provide a legitimate improvement, will not be viewed as a suitable expenditure of in-lieu-fee money. For example, if water quality was so poor that the stream is void of life, or nearly so, planting trees or stabilizing its banks or adding aquatic habitat structures would do nothing to expedite recovery. Proposed mitigation techniques need to be well understood and reliable. When uncertainties surrounding the technical feasibility of a proposed mitigation technique exist, it may be appropriate for the MRT to impose special requirements and ask for appropriate reporting. It may be possible for these special requirements to be phased-out or reduced once the attainment of prescribed performance standards is demonstrated. It shall be the role of the recipient to submit a plan detailing specific performance standards to the MRT to ensure that the technical success of the project can be evaluated.

4. Proximity. As a general rule, project sites should be within the same eco-region, river basin, and 8-digit HUC as the affected streams and projects generating the in-lieu-fee monies. In order to ensure in-kind functional replacement, the in-lieu-fee mitigation will generally be performed on streams within one stream order of the impacted stream on which permitted activities

generated the in-lieu-fee monies. Exceptions may be made for Ohio River tributaries that are in the vicinity of the permitted impact, but not within the basin. There may be other exceptions left to the discretion of the MRT for consideration.

5. Impaired Streams. Streams occurring on the 303(d) list and targeted watersheds as identified by Federal and State agencies will receive a higher priority for use of in-lieu-fee monies if the habitat restoration work would ameliorate the impairment.

6. Project Size. To the degree that mitigation opportunities present themselves and the amount of fee money becomes available, larger stream restoration/enhancement projects (1,000 feet or more) will receive higher priority than smaller such projects.

7. Watershed Management. In-lieu-fee projects will be selected within watersheds where other water quality/stream restoration monies (e.g., 319 grants, NRCS programs) have been allocated when and where such opportunities exist. Whenever possible, in-lieu-fee monies will be concentrated within watersheds where a high degree of impairment exists and landowner cooperation is widespread. In-lieu-fee mitigation projects should be planned and developed to address the specific resource needs of a particular watershed.

V. PROJECT PLAN REQUIREMENTS:

A. The level of information and detail submitted to the MRT will vary depending upon the stage of review and/or approval. To determine whether a restoration site/proposal is viable and worth pursuing, a preliminary plan will be submitted. Upon review and approval of a preliminary plan, a more detailed design plan would subsequently be submitted to the MRT for review and approval.

B. Preliminary Plan. A preliminary plan should contain sufficient information and detail to allow the MRT to make a decision as to whether or not the project seems viable and appropriate while at the same time being conservative and not overly exhaustive in terms of resource expenditure (i.e., time and money). Preliminary plans should include, at a minimum the following:

1. Location of the proposed restoration site (Narrative description, maps, lat/long or UTM coordinates)
2. Baseline conditions and characterization of the site, including a general assessment of stream type, stability (i.e., pattern, profile, dimension, sediment/substrate, etc.), stage of channel evolution, functional assessment (e.g., EPA's Rapid Bio-assessment Protocol, Eastern Kentucky Stream Assessment Protocol, etc.), and photographs (clear & legible). The level of detail for baseline conditions contained in a preliminary plan is expected to be less rigorous than those in a subsequent

design plan; however, the same fundamental items pertaining to stream condition need to be addressed. Visual assessments and best professional judgment may provide sufficient information for a general narrative of existing stream conditions in a preliminary plan.

3. Conceptual plan outlining the type of improvements to functions (physical, chemical, and biological processes) and values that are proposed and how they may be accomplished.
4. Preliminary project costs based on anticipated scope of work needed to accomplish proposed levels of functional replacement.
5. General conditions and needs of the watershed and potential opportunities for additional projects.

C. Design Plan. A design plan submitted to the interagency MRT should include, at a minimum, the following:

1. Location of the proposed restoration site (Narrative description, maps, lat/long or UTM coordinates)
2. Baseline conditions and characterization of the site including an assessment of stream type, stability (i.e., pattern, profile, dimension, sediment/substrate, etc.), stage of channel evolution, functional assessment (e.g., EPA's Rapid Bio-assessment Protocol, Eastern Kentucky Stream Assessment Protocol, etc.), and photographs (clear & legible).
3. Plan outlining the type of improvements to functions (physical, chemical, and biological processes) and values that are proposed and how they may be accomplished.
4. Schedule for conducting the work.
5. Performance standards for determining ecological success that are measurable, meaningful, based on sound ecological principles and directly linked to the functional replacement being proposed for the restoration project.
6. Reporting protocols and monitoring that are tailored to the specifics of the proposed restoration project and that are pertinent to the chosen performance standards.
7. Financial, technical, and legal provisions for restoration work and remedial actions and responsibilities.
8. Financial, technical, and legal provisions for long-term management and maintenance.
9. Provisions that clearly state that the legal responsibility for ensuring successful restoration rests with the in-lieu-fee recipient.

10. "Letter of Intent" signed by landowner needs to be submitted prior to the MRT approving monies to be spent on project design.
11. Conservation easement or deed restriction must be executed prior to the MRT approving monies to be spent on construction.

VI. AGREEMENT MODIFICATION AND WITHDRAWAL:

A. Any signatory entity may propose modifications to these local procedures. The proposed modification shall be made in writing and submitted to all MRT members. Modification shall require unanimity for approval and must be signed by the appropriate signatory official or each signatory. Votes to modify these procedures must occur in person or in writing and all parties of the MRT must vote.

B. Any MRT member may withdraw from this agreement with 30 days advance written notice to all signatory members.

U.S. Army Corps of Engineers

By: _____ Date: _____
Louisville District
Regulatory Branch Chief

By: _____ Date: _____
Huntington District
Regulatory Branch Chief

By: _____ Date: _____
Nashville District
Regulatory Branch Chief

U.S. Environmental Protection Agency Region IV

By: _____ Date: _____

U.S. Fish and Wildlife Service:

By: _____ Date: _____
Field Supervisor
Kentucky Field Office

Kentucky Department of Fish and Wildlife Resources

By: _____ Date: _____
Commissioner

**Kentucky Natural Resources & Environmental Protection Cabinet, Division
of Water**

By: _____ Date: _____
Director

Richerson/OP-FS/rb/pn.wp
Devine/OP-FS